No. SC85120

IN THE MISSOURI SUPREME COURT

In the Interest of:

P.L.O. and S.K.O.,

Minor Children

BRIEF OF RESPONDENT DIVISION OF FAMILY SERVICES

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102
Telephone 573-751-3321
Facsimile 573-751-9456

TABLE OF CONTENTS

extended foster care ground and extended foster care is a ground for termination, termination of the mother's parental rights for her children's being in foster care for at least 15 of the most recent 22 months complies with due process because termination for extended foster care has a rational relationship to the state's legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time and are still awaiting parental maturity. (Responds to appellant's argument I.)

and the mother did not take any further action until nearly two years later when termination proceedings were about to begin, but never sought to compel or even request the circuit court or the Division of Family Services to comply with statutory time lines. (Responds to appellant's arguments II a, b, c, d, e, f, g, h, i, j, and k.)

A. Failure to preserve for appellate review .....

B. The juvenile officer had reasonable suspicion of neglect .....

C. The circuit court properly entered a protective custody order .....

D. Statutory time lines are merely directory .....

E. Religious matching placement.....

F. Actual notice of adoption proceeding.....

III. Though the question has not been preserved for appellate review, the word "emergency" in § 211.183.1, RSMo, deeming reasonable efforts to have been made to prevent removal from the family home when first contact with the family occurred during an emergency, is not void for vagueness because the word does not proscribe any conduct and no one is seeking to enforce against the mother a prohibition against an emergency. (Respond's to appellant's arguments 2 a and 3.)

A. Failure to preserve for appellate review .....

TABLE OF AUTHORITIES

Cases:

Statutes:

Session Laws:

Regulations:

Congressional Reports:

JURISDICTIONAL STATEMENT

On November 21, 2002, the circuit court entered a judgment terminating the mother's parental rights. (L.F. 135.)

On November 26, 2002, the mother filed a motion for new trial. (L.F. 149.) On December 3, 2002, the mother filed a motion to amend the judgment by interlineation and a motion to vacate the judgment. (L.F. 152, 154.) On January 14, 2003, the mother filed a motion to amend her motion to vacate the judgment. (L.F. 185.) On January 21, 2003, the mother filed her amended motion to vacate the judgment and withdrew her motion to amend the judgment by interlineaton. (L.F. 8, 157.)

On January 21, 2003, the circuit court overruled the mother's motion for a new trial and her amended motion to vacate the judgment, and the mother filed a notice of appeal to the court of appeals. (L.F. 8, 191.)

On February 10, 2003, the mother withdrew her appeal in the court of appeals and filed an amended notice of appeal to this court. (Appellant's Br. 19; L.F. 200.)

No notice of appeal is effective unless filed not later than ten days after the judgment appealed from becomes final. *See* Rule 81.04(a). If a party timely files an authorized after–trial motion, and if all such motions have been ruled, the judgment becomes final on the date of ruling the last such motion or thirty days after entry of judgment, whichever is later. *See* Rule 81.05(a)(2)(B).

In this case, the mother filed a timely motion for new trial, which was overruled on January 21, 2003. Twenty days later, on February 10, 2003, she filed a notice of appeal to this court. Because the timely filing of a notice of appeal is a prerequisite to appellate jurisdiction, *see D.J.B.*, 704 S.W.2d 217 (Mo. banc 1986), this court lacks jurisdiction over this appeal.

STATEMENT OF FACTS

Sexual Abuse of G.O.

In April of 1997, Brian Wilson of the Newton County office of the Division of Family Services investigated a telephone hot line report alleging that Albert Ray Owens had sexually abused one of his daughters, G.O. — then 14 years old — by touching her with his hands and having sexual intercourse with her since she was in sixth grade. (Tr. 6–7; Pet'r Ex. 2 pp. 2, 3.) According to the report, G.O. told her mother, Gloria Owens, about the abuse, but "in the beginning" her mother did not believe her. (Tr. 7; Pet'r Ex. 2 p. 2.)

Wilson interviewed G.O. who related that the abuse started two to three years ago after her mother refused sexual relations with her father because he would not take a bath and her mother could not stand it any more. (Tr. 23; Pet'r Ex. 2 p. 5.)

Wilson also interviewed Gloria Owens. (Tr. 11; Pet'r Ex. 2 p. 8.) She related that she was not aware that sexual abuse had been occurring and though she left the children home alone with Albert on Tuesday nights when she went to church and she was gone on the Saturday of the last abuse, she was unsure whether Albert did this. (Tr. 11; Pet'r Ex. 2 p. 8.)

After more investigation, Wilson concluded that there was probable cause to believe that the father had abused G.O. (Tr. 10; Pet'r Ex. 2 p. 17.) Family Services caseworker Connie Jacobs opened a protective services case, one designed to prevent

the children from coming into foster care. (Tr. 13, 188–190, 193–194.) The children were left in the home because Gloria asked Albert to leave, and he did. (Tr. 194, 561, 716.) But later, he began "coming around." (Tr. 717.)

Efforts to Prevent Children from Coming into Custody

Jacobs helped Gloria obtain an ex parte order against Albert to keep him from being around the children. (Tr. 203.) One of Gloria's many written services agreements required her to divorce Albert, but that was not Family Services' policy. (Pet. 280–281, 339, 428–429.) Gloria had initiated a divorce, but did not follow through. (Tr. 281, 428.)

Jacobs instructed Gloria not to let Albert have access to the children, but Jacobs saw Albert in the family's yard once a month. (Tr. 274–275.) He ran off a "resources coordinator" who Jacob sent to the trailer to look into the head lice problem and to help with other parenting issues. (Tr. 201–202, 208–209.) Albert would leave when he saw Jacobs. (Tr. 276.) Albert admitted coming to the home to visit the children after the ex parte order expired. (Tr. 604–605.) He continued visiting Gloria even into 2002. (Tr. 462–463.)

Jacobs initiated an intensive home services program, the last stage before children are removed from a home. (Tr. 208–209.) Gloria had counseling for six months. (Tr. 205.) She participated in the Futures Program to help her get training for a job, a job itself, and clothes for a job. (Tr. 195.) She was nearing the end of

her eligibility for welfare payments, and she needed to become independent. (Tr. 196.)

Jacobs helped her get a new trailer. (Tr. 196.) Her old trailer had holes in the floor, things crammed everywhere, just a walking space through it, and no sleeping space for the children. (Tr. 198.) Family Services made two trailer payments for her. (Tr. 198.) But her new trailer eventually became "filthy." (Tr. 207, 210.) At one point, the mother had a bulldozer out to clean up her yard. (Tr. 723.)

Jacobs gave Gloria a pair of bifocals so she could see the children's head lice. (Tr. 197.) Jacobs even picked head lice out of the children's hair herself "for hours." (Tr. 197.) On a monthly basis, she picked the older children up from school when it sent them home because of head lice, but could not contact Gloria. (Tr. 200, 205.) The school children called E.O., "Lice girl." (Tr. 200.) Jacobs got shampoo for them. (Tr. 201.) But the children continued to fail at and to be removed from school for head lice. (Tr. 211.)

Jacobs got the mother in a Christmas club that had a church donate clothes, sheets, pillows, blankets, and toys, and Jacobs made two or three trips in her minivan to deliver them. (Tr. 215–216.) But the mother returned all the items for money. (Tr. 215.) Jacobs also delivered some of her neighbor's unwanted furniture to the mother's home. (Tr. 216.)

Gloria claimed to be home schooling P.O. and S.O. and would not let Jacobs place P.O. in a private school to ease her into the public school system. (Tr. 205, 207.) She had been advised that P.O. needed full time special education. (Tr. 789–790.) She claimed to have gotten them their inoculations against childhood diseases, but had not. (Tr. 211–212.) She did not get them until after school had started and her other children were in school. (Tr. 793–795.)

Children's Coming into Custody

On September 2, 1999, Jacobs asked the Newton County juvenile officer for permission to place the mother's non–adult children in Family Services' custody. (Tr. 213; Pet'r Ex. 14 p.3.) Those children, all girls but one, in order of oldest to youngest were: G.O., R.O. (the boy), E.O., P.O., and S.O. (Pet'r Ex. 14 p. 1.) P.O. was born five years after E.O., and P.O. and S.O. were born two years apart. (Pet'r Ex. 14 p. 1.) Jacobs had been working to keep the family together in their home together since April of 1997 (Tr. 188–190, 214–215), but now she thought that Family Services had exhausted all the resources and referrals the agency could provide the family in their home. (Tr. 215.)

Jacobs wanted to take the children into custody because of the physical condition of the trailer home (falling down and unstable) and the yard (children playing around cars on blocks and in the road), the mother had not sought medical treatment for children, the mother had not protected the children from the father whose abuse

against G.O. was substantiated, the mother suspects sexual abuse by the father against P.O., the mother had not immunized the children until the week before September 2, the mother had not placed P.O. (aged nine years) and S.O. in school, home school showed no results, and the children suffered from head lice. (Tr. 214; Pet'r Ex. 14 p. 2.) The juvenile officer directed her to remove the children from the home. (Tr. 217.)

Jacobs removed the children with Wilson and a sheriff's deputy. (Tr. 217.) Wilson took at total of thirty–four photographs of the inside and outside of the family's trailer home and the yard surrounding it. (Tr. 14–19, 218–219.)

After the children were removed, Jacobs' goal for the family became reunification. (Tr. 219.)

Neglect Petition, Protective Custody Order, and

Consent to Protective Custody

On September 3, 1999, within 24 hours of when he directed that the children be taken into temporary protective custody, the deputy juvenile officer filed a petition under § 211.031.1(1), RSMo, alleging that the children were in need of care and treatment that the circuit court could provide because their mother neglected to provide the care and support necessary for their well–being, namely, they suffer from chronic head lice that results in them missing numerous days of school, their home contains soiled clothes and dirty dishes piled in the floor, there is food on the carpet

and filth throughout the home, and the mother does not follow through with medical treatment for the children. (L.F. 11–12.) On the same day, the circuit court entered an order of protective custody finding that the children suffer from chronic head lice that results in them missing numerous days of school, that there is food on the carpet and filth throughout the home, and that the mother does not follow through with medical treatment for the children. (L.F. 13.) The protective custody order detained the children "under the custody of this Court and the Division of Family Services at a suitable placement pending the further Order of this Court." (L.F. 13.)[1]

Seven days later, on September 10, 1999, the mother signed and filed a Temporary Transfer of Custody in which she waived service of summons, entered her appearance, and stated: "I ... do hereby give my consent for my children to be placed in the temporary care and custody of the Court and the Division of Family Services." (L.F. 16.)

Condition of P.O. and S.O. upon Coming into Custody

[1]Also on the same day, the circuit court terminated jurisdiction over G.O., presumably because she was 17 years old. (L.F. 15; Pet'r Ex. 14 p.1.)

Upon being taken into custody, both P.O., who was nine with a speech impediment and no vision in one eye, and S.O., who was six, underwent psychological evaluations. (Tr. 43, 44, 47.) The psychologist, who treated them from September of 1999 to June of 2001 and conducted some visitations with the mother, administered intelligence and achievement tests and a children's depression inventory. (Tr. 44.) She found them initially to be "very closed little girls." (Tr. 41, 46.) P.O., who spoke minimally, performed at the mildly mentally retarded level; S.O. performed at the borderline mentally retarded level. (Tr. 44–46.) Both performed at these levels because of a lack of verbal skills and formal education, not because of any organic condition. (Tr. 45–46, 107.)

P.O. and S.O. also underwent educational evaluations. They both were given intelligence tests, achievement tests, articulation tests, and P.O. also was given an adaptive behavior skills test that measures the daily living skills of children of low intelligence. (Tr. 136.) Both girls had multiple articulation errors; P.O. received speech therapy for three years, and S.O. for a lesser period of time. (Tr. 137.) S.O. did not test mentally retarded. (Tr. 153.) P.O., however, tested moderately mentally retarded with an intelligence quotient of 48 and an adaptive quotient of 52. (Tr. 137.) P.O., who was nine years old, was at the four–year–old level academically. (Tr. 139.) She could not recite the alphabet, could not recognize her name in print, could not add or subtract single digit numbers, and counted with her fingers. (Tr. 139.)

The foster parent enrolled both girls in a public school district, which gave them individualized education plans. (Tr. 135–135.) S.O. was placed in kindergarten, a year behind where she should have been according to her chronological age. (Tr. 140.) By the time of trial, she was in third grade and had "made excellent progress with exposure to curriculum." (Tr. 140–142.) Her individualized education plan addressed speech pathology only. (Tr. 141.) P.O. was given a one–on–one para–educator who worked with her alone for two to three hours a day. (Tr. 142.) By trial, P.O. had made strides, but she read at a late second, early third grade level. (Tr. 144.) She still was not at grade level. (Tr. 142.) Due to her increasing physical maturity, she was placed in the fifth grade; academically, she should have been in fourth grade, and chronologically, she should have been in sixth. (Tr. 143.–144) She was removed from regular classes for speech therapy for twenty minutes two times a week. (Tr. 148.)

P.O.'s social skills were "very low." (Tr. 138.) She made no eye contact and mumbled in response to questions, if she responded at all. (Tr. 138.) S.O.'s withdrawal was not as dramatic or as severe. (Tr. 138.) Though P.O. was older, S.O. was the leader, speaking for both girls to the extent that P.O. would look at S.O. when asked a question and had to be separated from S.O. before she would answer. (Tr. 138.) By the time of trial, both girls' social gains were greater than their academic gains. (Tr. 148.)

Upon being taken into custody, the girls were placed with Russ and Kathy Ginger. (Tr. 329.) Kathy Ginger who had been a foster parent for twelve years and was trained to foster parent children who had been physically or sexually abused and children who were behavior problems. (Tr. 157–158, 300–302.) She kept the girls for one and one–half years, until April 2001, when Ty and Jennifer Osgood became the girls' foster parents. (Tr. 159, 329.) When Kathy Ginger got the girls, they were dirty, had head lice and lots of dental decay, especially S.O. (Tr. 159.) S.O. was anesthetized to put on numerous tooth caps. (Tr. 160.) The foster mother discovered that the girls did not know their letters or their colors when she gave P.O. a letter P for purple, the color of the back pack she gave her, and P.O. still could not separate her back pack from the other children's. (Tr. 162.)

P.O. told her foster mother that "our house was filthy," "roaches all over," and "mice." (Tr. 166–167.) P.O. told her that a lot of times they did not have food, and S.O. told her that one of their older brothers was nice because he took them out to eat when they did not have food in their house. (Tr. 167.)

Loss of Sight in P.O.'s Eye

P.O.'s blindness in one eye was the result of an injury caused by her father. P.O. told Kathy Ginger that her father threw a motor part at her when she was riding her bike and it hit her in the eye. (Tr. 163.) "It hurt worse than anything I can ever remember." (Tr. 163.) She related that they did not go to the hospital because her

father would get into trouble, and they would not get any more money from him. (Tr. 163.) The foster mother took her to three doctors, who told her that P.O.'s eye was treatable when the injury occurred, but not now. (Tr. 163–164.) P.O. has a metal sliver in her eye and a detached retina. (Tr. 165–166.) She wears glasses to protect her uninjured eye, and she may lose her injured eye at some point because it is prone to infection. (Tr. 165–166.)

P.O. told her first treating psychologist that her father got upset and threw something at her from the other side of the room and a sliver went into her eye. (Tr. 47–48.) She told the psychologist that she was not taken to the emergency room. (Tr. 48–49.)

The mother first took P.O. to a physician in August 1997 and gave as history that the injury occurred in April. (Pet'r Ex. 7 p. 7.) The physician scheduled an appointment in Kansas City with a Dr. Cibis at the Children's Mercy Hospital, but the mother cancelled the appointment and never rescheduled. (Tr. Pet'r Ex. 7 p. 7; Tr. 742.)

A picture of P.O.'s eyes, showing the results of her injury, is at page 5 of Petitioner's Exhibit 7, a letter from Dr. Cibis. The caption below the picture states: "Blind from trauma."

Sexual Abuse of P.O. and S.O.

Both girls had nightmares the entire first two weeks of foster care and intermittently thereafter. (Tr. 167, 303.) S.O. had a dream in which their father broke through a window of their foster home and shot everyone but her and said, "You're next." (Tr. 168, 304.) After the dream, S.O. told the foster mother that her father had laid on top of E.O. and A.O. and her with his privates. (Tr. 304.) On another occasion, the foster mother overhead S.O. asking P.O. if she remembered the time their father raped her. (Tr. 317, 323–324.)

P.O. woke out of a dream and told Kathy Ginger that she was afraid her father would come and hurt her because he had told her that if she ever told what he did to her, he would kill her sister. (Tr. 307.) When the foster mother asked P.O. what her father did to her, she said: "He laid on me with his private parts." (Tr. 308.)

P.O. told her first treating psychologist that her father had touched her and "sexually abused" her. (Tr. 59–60.) Because P.O. told her this just after she first revealed it to someone else, the psychologist did not inquire further. (Tr. 59–60.)

Mother's Visitation

The mother first visited P.O. and S.O. under the supervision of a lay person for 1 hour per week from September 1999 to October 2000. (Tr. 51, 113, 115, 222.) The mother would occasionally miss visits at the beginning of this period of time, but would miss visits more frequently later on. (Tr. 117.) The mother would bring her adult children, their partners, and their children to the visits. (Tr. 119.) The girls were

happy to see their siblings, nieces, and nephews and interacted with them, but not with their mother as much. (Tr. 120.) They would not exchange affectionate greetings with their mother and would only sit quietly and listen to her. (Tr. 119.) The mother would bring small gifts, but never clothes or school supplies, unless they were from her church. (Tr. 122, 174.) At the mother's first Christmas visit, she gave P.O. a toy for a three to five year old; that made P.O. very angry. (Tr. 175.) At Christmas at the foster home, the girls tried to open their presents so as not to tear the boxes so they could return them to WalMart for money, which is what they did at their parents' home when their mother's church gave them presents. (Tr. 176.) The girls' head lice reoccurred after visitation. (Tr. 124.)

Unlike with her two older children, R.O. and E.O., the mother was uncooperative in setting up visitation with P.O. and S.O. and would not respond to letters requesting that she contact Family Services personally, but only send letters saying she wanted visitation without proposed dates or times. (Tr. 346–357.)

The mother would try to visit the children at places and times that were unsupervised. First, by stopping at the children's school (Tr. 233–234.) And then, after visitation ceased, by attending the church to which their second foster family took the children. (Tr. 774–775, 808.) Family Services asked that these attempts stop. (Tr. 234, 775, 808.)

The girls told Kathy Ginger, their foster mother, that they did not want to visit their mother. (Tr. 172.) After visits, the foster mother felt like she was taking the girls "from a funeral home" because they were somber, quiet, and crying. (Tr. 173.) Occasionally, the girls would get sick and sad and gloomy on visitation days and miss school. (Tr. 116.)

Because of the girls' physical symptoms upon visitation, their first treating psychologist suggested in October of 2000 that the mother's visitation occur at her office so she could observe their interaction and offer therapy. (Tr. 51, 106.) The psychologist scheduled visitation the same day and place every week, but the mother did not really participate. (Tr. 52, 107.) The mother did not attend regularly, would not call ahead or reschedule, and when she did attend, she would arrive late. (Tr. 52.) The psychologist saw no progress in the mother's becoming independent from her adult children, obtaining a job and transportation, or being able to meet P.O.'s adolescent developmental needs, and visitation was not productive for the girls. (Tr. 54–59, 109.) Before visits, the girls still got sick, depressed, and missed school. (Tr. 58.)

The psychologist thought that these physical symptoms were caused by the girls' guilt over not wanting to see their mother, so in March of 2001 the psychologist recommended that visitation with the mother cease. (Tr. 61–62, 107.)

In February of 2002, however, the mother actively scheduled with her caseworker a visit with P.O. and S.O. (Tr. 366.) The girls became so anxious that their guardian ad litem asked that the visit be canceled, and it was. (Tr. 366.)

Efforts to Reunify P.O. and S.O. with Mother

After the girls' removal from their mother, Gloria did obtain employment as a home health aide for 11 months, but she expended no resources on medical insurance, clothing, school supplies, or lunch money for the children. (Tr. 221, 260, 711, 810–811.) She received more counseling, but used it to complain about Family Services. (Tr. 222.) One year after the children came into custody, Jacobs initiated the first service agreement between Gloria and Family Services. (Tr. 228; Pet'r Ex. 15.) Before the first written service agreement, Jacobs covered in monthly meetings with Gloria the plan to reunify the family. (Tr. 228.) But Gloria did not comply with her part of the agreement: she did not maintain her trailer or yard, would not let Jacobs into the trailer or answer her door, would change appointments, did not pay child support, and visited the children at school outside of her scheduled visitation. (Tr. 229–234.)

In January 2001 the family received a new caseworker, Regina Huffman. (Tr. 191, 328.) By that time, Family Services' goal changed to reunifying the mother with her children, but with a concurrent plan of termination if there were to be no reunion. (Tr. 329–330.) Huffman sent Gloria an introduction letter and asked her to make

contact, but she did not. (Tr. 330.) Huffman scheduled a permanency planning meeting, and Gloria sent a letter saying she could not make it. (Tr. 331.) Huffman rescheduled for March 2001, which was when they first met. (Tr. 331.)

Huffman entered into four more service agreements with Gloria; but in March 2002 Gloria refused to enter into any more, apparently on the advice of her attorney who moved to change social service workers . (Tr. 227–228, 335–337; Pet'r Exs. 15, 16 at 8, 9.) Even after that, Huffman offered three more service agreements. (Pet'r Ex. 16 at 8–11; Pet'r Ex. 19.) These agreements focus on Family Services' efforts to reunify the girls with their mother.

Under Huffman's service agreement of March 2001, Gloria agreed to obtain a psychological evaluation and a parenting assessment, but failed to do so. (Tr. 338.) She also agreed to permit unannounced visits to her home. (Tr. 339.)

Huffman made monthly visits, but decided it was fruitless because Gloria would not answer the door. (Tr. 340–341.) Huffman finally obtained entry to Gloria's home only upon announced visits made by certified letter. (Tr. 341.) The first such announced visit was in September 2001. (Tr. 342.) The home was cluttered, but livable; the outside was picked up. (Tr. 342.) Huffman never again obtained access to the home until another pre–arranged visit in February 2002. (Tr. 343.) The home was livable; the outside still needed work; there was no skirting around the trailer; there was garbage behind the trailer; a car needed to be picked up. (Tr. 344.) After

the February visit, she tried to make home visits but was unsuccessful. (Tr. 349.) Huffman left her card each time. (Tr. 344.)

Huffman occasionally received letters from Gloria and sent letters to her asking for personal contact in order to find out what she was doing, eliminate confusion, and more efficiently provide services. (Tr. 345–346.) Beginning in March 2001 and ending in July 2002, Huffman sent Gloria some twenty letters requesting cooperation. (Tr. 489–495; Pet'r Ex. 20.)

Huffman say Gloria next in April 2001 at the courthouse, and at the end of April Gloria called and said she was in the hospital. (Tr. 348.) Huffman did not see her in May or June until one of her older daughters brought Huffman a note at her office. (Tr. 348.) Huffman asked where her mother was, and the daughter replied she was out in the car. (Tr. 348.) Huffman went out to see her and ask her to meet; Gloria agreed as soon as she felt better, but never set up a meeting. (Tr. 348–349.)

In June 2001, Family Services discontinued funding Gloria's counseling because of its length of time and lack of progress. (Tr. 349–350.) Gloria agreed there was little progress. (Tr. 350.) Counseling's goals were to help her implement the service agreement, end her reliance on other people, develop her coping skills, and improve her self esteem. (Tr. 351–352.)

Huffman's next service agreement in June 2001 required Gloria to attend Alcoholics Anonymous meetings as a source of free counseling to help her become

self sufficient. (Tr. 354.) She was given vouchers to have the facilitator record her attendance, but she never returned any. (Tr. 354, 364.) She agreed to obtain a drivers' license and insurance, but provided no proof that she did. (Tr. 354–355, 365.) She agreed to monthly visits with Huffman to discuss her progress, but she did not come. (Tr. 355, 360.) She failed to attend most visitation with Dr. Heck, and Huffman wrote her asking for personal contact so visitation could be arranged, but Gloria only sent a letter asking for visits, but never offering dates or times. (Tr. 357.) Huffman had no personal contact with her from June to August. (Tr. 358.)

Huffman's next service agreement in September 2001 required vocational rehabilitation for job assessment and training. (Tr. 358.) This was substituted for employment because Gloria complained that employment was too physically demanding and obtained disability payments. (Tr. 378–379.) Vocational rehabilitation was intended to assess what employment she could perform. (Tr. 379.) Gloria did this, but in December, and she was emphatic that she was not going to work. (Tr. 363–364.) The agreement also required payment of child support. (Tr. 360.) A child support order was issued in July for $109.00 per month. (Pet'r Ex. 1.) Gloria made one payment in March 2002. (Tr. 365.) And the agreement required free therapy with a counselor of Gloria's choice. (Tr. 361.) Family Services gave her some referrals, but Gloria did not follow up. (Tr. 361, 364.)

Beginning in December 2001, Gloria received some counseling at the Lafayette House. (Tr. 364, 367.) This was incorporated into her services agreements. (Tr. 373.) Lafayette House arranged classes and programs for Gloria for four half–days a week. (Tr. 368–369; Pet'r Ex. 17.) Alcoholics Anonymous was available nearby, and Gloria agreed to attend with transportation there offered by Lafayette House. (Tr. 369–370.) Individual therapy with a counselor was also offered. (Tr. 371.) All this was free to Gloria. (Tr. 371.) In January 2002, Gloria attended only eight days at Lafayette House with her longest daily attendance being one and one–half hours. (Tr. 371–372; Pet'r Ex. 18 p. 1.) In February, Gloria attended five days with her longest daily attendance being one hour. (Pet'r Ex. 18 p. 2). In March, Gloria attended two days with her longest daily attendance being one hour. (Pet'r Ex. 18 p. 3.) In April, Gloria attended two days with the longest daily attendance being 1 hour. (Pet'r Ex. 13 p. 5.) Gloria did not attend in May. (Tr. 372.) In June, she attended three days with her longest daily attendance one and one–half hours. (Pet'r Ex. 18 p. 4.) She did not attend in July and August. (Tr. 373.) She did not attend Alcoholics Anonymous or counseling. (Tr. 374.) She did not even attend the classes her counsel said she would attend. (Tr. 376–377.) She had an automobile at this time, and transportation was not a problem since 2001. (Tr. 795–797.)

In May 2002, Huffman learned that Gloria's home had become unlivable. Huffman and a juvenile officer went there looking for R.O., who had run away from

foster care. (Tr. 380.) Richard, one of Gloria's adult children, came to the door, but would not let them in. (Tr. 380.) The inside of the trailer was very dark and emitting a smell, clutter was piled up, and towels were placed over the windows. (Tr. 381.) Huffman also received a telephone call that the electricity was turned off for several months; the electric company confirmed that it was. (Tr. 381.) Huffman sent Gloria a letter asking her for personal contact so she could help get the electricity back on, but Gloria did not respond. (Tr. 381.) Gloria admitted that her trailer did not have heat or electricity. (Tr. 821.)

Termination Petition and Subsequent Procedural Events

On June 6, 2001, after placing P.O. and S.O. with two foster families and providing other services to them and the mother, Family Services decided to seek termination of the mother's parental rights and filed its decision with the court. (L.F. 31–34, 37.) On August 16, the circuit court set the case for review on September 7. (L.F. 1).

After on September 10, 1999, when the mother consented to having her children temporarily removed from her custody, the second action the mother took in the case came on August 30, 2001, when she applied for the assistance of appointed counsel. (L.F. 47.) Her application was filed on September 4, before she was served with a summons on September 5 that informed her of her right to the assistance of appointed counsel. (L.F. 1, 42, 43, 46.) On September 7, the circuit court appointed

counsel for the mother and set the case for a pretrial conference on September 13, which was held. (L.F. 1.)

The third action the mother took came on January 25, 2002, when her counsel filed a motion for visitation. (L.F. 2, 50.) On January 31, Family Services filed the original petition for termination.[2](L.F. 53.) On February 4, the mother filed an amended motion for visitation and a request for production of documents. (L.F. 2.) On February 5, the circuit court set a permanency hearing for February 11, and on February 11 set the mother's motions for February 27. (L.F. 2.) The mother filed additional motions (L.F. 2–3), and on February 27, the court ruled some the mother's motions, the mother filed more motions, and Family Services moved for a change of judge. (L.F. 3.) The court did not rule or take under submission the mother's amended motion for visitation.

[2]The original petition did not seek termination of parental rights with respect to R.O. and E.O. (L.F. 44, 53.) In 2002, they would become 18 and 17 years old, respectively. (Pet'r Ex. 14 p. 1.)

On April 10, a new judge was assigned. (L.F. 4.) On April 22, a pretrial conference was set for May 23. (L.F. 4.) On that day, the mother filed more motions, and on June 27, some of her motions were ruled, including her motion for more definite statement that was sustained in part. (L.F. 4.) The court did not rule or take under submission the mother's amended motion for visitation. On July 17, the amended petition for termination was filed. (L.F. 101.)

On September 17, trial was set for September 24. (L.F. 6.) Trial began on September 26. (L.F. 6.)

Psychologists' Opinions

In 2002, Dr. Kevin Whisman, a psychologist, evaluated Gloria to assess her parenting skills. (Tr. 385–386.) The mother's intelligence quotient tested 77, low average but not mentally retarded. (Tr. 388.) She was oriented to time and place, could form logical conclusions, and understood simple processes. (Tr. 388–389.) But she was angry and depressed, projected her anger onto others, and had difficulty expressing her emotions and limited insight. (Tr. 389–391.) Dr. Whisman diagnosed the mother with Axis I depression, which did not cause him to be concerned about her ability to parent, and Axis II borderline intellectual functioning, which again did not cause him to be concerned. (Tr. 396.) He saw no reason why she could not modify her home environment. (Tr. 398.)

Gloria mother did "real well" on the Parent Awareness Skills Survey. (Tr. 392.) She had good parenting skills and knew what needed to be done with children. (Tr. 392.) However, she told the psychologist that she saw her husband touch her children in "unfatherly ways," but did not believe that he had sexually abused her girls until 2002. (Tr. 397, 422–423.) She lacked insight that their father's behavior was "really wrong." (Tr. 423.) This did cause him to be concerned about her ability to parent. (Tr. 397, 407–408, 422–423.)

The mother also told Dr. Whisman that R.O. had run away from his foster home and that she knew where he was. (Tr. 394–395.) She admitted at trial that when R.O. ran away from his foster home for about six months, he stayed with her or else she knew where he was or how to contact him, but that she would not tell Family Services where he was. (Tr. 809.)

Also in 2002, Dr. Whisman and Barbara Thompson, a licensed clinical social worker, evaluated P.O. and S.O. (Tr. 399, 404, 496–498.) Dr. Whisman concluded that the girls perceived that they had two sets of parents and were confused about who their parents were, either Gloria and Albert or their foster parents, Jennifer and Ty Osgood. (Tr. 420.) He recommended that they be adopted by their foster parents. (Tr. 402.) He concluded that the girls were confused about the identity of their parents and recommended that they be adopted as a result of administering them projective sentence and drawing tests. (Tr.402.) When P.O. was asked to complete

sentences about her mother and father, she did not identify who her parents were, but when asked, she said that they were the Osgoods. (Tr. 403.) P.O. also told Dr. Whisman that she hoped the Osgoods would adopt her. (Tr. 414.) When S.O. was asked to complete sentences, she would ask which family. (Tr. 404.) When told she could choose, she would choose the Osgoods. (Tr. 404.) S.O. also told Dr. Whisman that she wished Ty was her father and she thought her family was Ty and Jennifer and P.O. (Tr. 405.)

Ms. Thompson saw the girls two times a month beginning in January 2002. (Tr. 498.) The girls introduced themselves as Hope and Grace Osgood, the surname of their foster parents, and asked to be called by those names. (Tr. 511.) When asked by Thompson individually, each girl told her that their new names was their idea. (Tr. 511.) Family Services had instructed the foster parents that the girls could not begin using their new names, but the girls used them, anyway. (Tr. 441–442.)

Thompson concluded that the girls did not have a "healthy bond" to their biological family and that reunification would be detrimental. (Tr. 502, 529.) Any time their biological family came up, P.O. would physically withdraw by scooting away into a corner, covering her face with a pillow, and closing her posture to the extent of turning her back on everyone in the room and even climbing onto her foster mother's lap and burying her face in her legs. (Tr. 500, 502–505, 509.) S.O. would become physically agitated and rock or fiddle with her hair and jewelry. (Tr. 503.)

Both girls told her that they did not want to go back to their mother's, they did not want to talk about their mother, their removal from her home, or foster care. (Tr. 499, 503.) It was unusual for children not to want to return to their parent, and a strong indicator of an unhealthy bond. (Tr. 515.) Another indicator was P.O.'s referring to her father as "Ray." (Tr. 504.)

P.O. related that she was afraid to return because her father told her that he would kill her and her sister. (Tr. 503.) She was so frightened that she could not say it out loud, but had to write it on a piece of paper. (Tr. 504.)

Both girls told Thompson that they felt guilty about not wanting to return to their mother's and about being happy now. (Tr. 503, 509–510.) Caseworker Huffman asked Thompson to determine whether there would be any detrimental effect if the girls were given a St. Valentine's Day card their mother asked her to give them. (Tr. 507.) Thompson asked the girls whether she could screen their mail for anything that would cause them psychological distress, and they agreed. (Tr. 507.) Thompson viewed their assent as consistent with their feelings of distress over their biological family. (Tr. 508.)

Thompson reviewed the card and recommended that the girls not see it. (T. 507.) The card contained a statement that would encourage the girls' sense of guilt. (Tr. 511.) The mother mailed Thompson a letter that contained a newspaper advertisement she had run. (Tr. 514–515.) The ad and the letter were "guilt

provoking and manipulative." (Tr. 515.) The ad, letter, and Valentine's cards contained statements that implied the girls or the mother were in a situation of distress. (Tr. 521.)

They contained statements such as the following: "Be good for me. Stay strong for me. Keep your chin up. Remember you are always my P. girl and always will be." (Tr. 521.) "Wishing you all were here with me in our house. Sister Reynolds says keep your chin up. P. Be good and strong for your mommy, please. I would love to hear from you since I can't see you right now." (Tr. 522.) "Stay sweet and good for me. Keep your chin up, mommy's little angel. I am always thinking about you, missing you a lot." (Tr. 522.) "Hope and pray to see you real soon. My life is not complete." (Tr. 523.) "Hope you have been a good girl for me. Be good for me. Stay strong for me. Keep your chin up and remember I will always love you and you will always be my little girl." (Tr. 524.) "Just wishing you were all home with me. Everyone sends their prayers to both. Sister Reynolds says keep your chin up. Please write me and tell me how you're doing. Pleas write me back real soon. Stay strong for your mommy. Please forgive me. I hope and pray some day I will get to make up everything to you." (Tr. 524.)

Thompson was also concerned that the Osgood's had reported that P.O. began to engage in harmful behavior when she had contact with or a communication from her mother. (Tr. 512.) P.O. confirmed these behaviors for Thompson by answering

questions about them yes or no for her. (Tr. 512.) P.O. was beginning to exhibit signs of splitting behavior, the result of being unable to understand both the good and the bad in her mother and becoming distressed when she sees the bad. (Tr. 529–530.) Splitting behavior includes agitation, fearfulness, acting out, and self harming behaviors — all precursors of an adult borderline personality disorder. (Tr. 530–531.)

ARGUMENT

I.

Though the question has not been preserved for appellate review, and assuming that the trial court terminated parental rights upon the extended foster care ground and extended foster care is a ground for termination, termination of the mother's parental rights for her children's being in foster care for at least 15 of the most recent 22 months complies with due process because termination for extended foster care has a rational relationship to the state's legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time and are still awaiting parental maturity. (Responds to appellant's argument I.)

A. Failure to preserve for appellate review

To preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity, usually in a responsive pleading. *See In re T.E.*, 35 S.W.3d 497, 504–505 (Mo. App. E.D. 2001) (constitutionality of reasonable efforts, termination upon consent of parent, and social summary statutes not raised until on appeal)*; In re R.H.S.*, 737 S.W.2d 227, 233–34 (Mo. App. W.D. 1987)

(constitutionality of statutory ground for termination not raised until after judgment). In her answer to the amended petition for termination, the mother admitted that her children had been in foster care for at least 15 of the most recent 22 months (L.F. 102, 109.) But she did not raise *any* constitutional issue in her answer or even in her trial brief. (L.F. 109–113, 121–134.) Only after judgment in her motion for new trial did she assert that termination of her parental rights based upon the length of time her children were in foster care violated due process. (L.F. 150.) At that time, it was too late to preserve any constitutional issue for review.

In addition, the circuit court may not have terminated the mother's parental rights upon the extended foster care ground. In a section of its judgment entitled General Allegations, the court found that the children had been in foster care for at least 15 of the most recent 22 months. (L.F. 135–136.) But in a section entitled Count I Natural Mother – Gloria Owens that makes specific findings on the remaining grounds for termination, the court does not discuss extended foster care at all. (L.F. 137–143.) Finally, not all provisions of the termination statue express grounds for termination. *See In re J.J.P.*, 113 S.W.3d 197, 202 (Mo. App. S.D. 2003) (subsection 3 § 211.447.3, RSMo, is an "exception" to rather than a ground for termination). But assuming the trial court did terminate on the extended foster care ground and that such a ground exists, there is no constitutional difficulty.

B. Termination for extended foster care is constitutional

Because parental rights must be balanced with the rights of children and of the state, the standard to be applied in determining the constitutionality of statutes affecting those rights must be determined on a case–by–case basis. *See Blakely v. Blakely*, 83 S.W.3d 537, 546 (Mo. banc 2002) (declining to review grandparent visitation statute under strict scrutiny), citing *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (same); *see also Phelps v. Sybinski*, 736 N.E.2d 809, 817–18 (Ind. App. 5th Dist. 2000) (reviewing extended foster care statute). A Missouri statute is presumed constitutional unless the challenging party carries the burden of proving that the statute "clearly and undoubtedly" violates some constitution provision and "palpably affronts some fundamental law embodied in the constitution." *Blakely*, 83 S.W.3d at 540–41. Therefore, where feasible, the statute will be interpreted consistently with the constitution with all doubts resolved in favor of constitutionality. *See id.*

This court should follow the lead of the U.S. supreme court, the Missouri supreme court, and the Indiana court of appeals and apply the rational basis test to Missouri's extended foster care statute. But even under strict scrutiny, Missouri's statute is constitutional. Missouri has a compelling state interest in promoting adoptions of children suspended in foster care awaiting parental maturity. Moreover, Missouri's statute is narrowly drawn to make effective that interest because the statute merely provides a guideline for the time given to parents to rehabilitate themselves.

Termination is not compelled, but remains permissive upon a showing that it is in the child's best interests.

Like the Indiana, Nebraska, and Oklahoma statutes discussed below, Missouri's statute merely permits the filing of a petition to terminate parental rights when there is particular evidence of unfitness — "the child has been in foster care for at least fifteen of the most recent twenty–two months." § 211.447.2(1), RSMo 2000. Filing a petition to terminate for extended foster care is not mandatory. The state has the discretion not to file a such petition when the child is being cared for by a relative, a compelling reason exists that filing such a petition would not be in the child's best interest, or the state has not provided the parents with reasonable efforts to make it possible for the child to return home. *See* §§ 211.447.3, 211.183.1, RSMo 2000; *In re J.J.P.*, 113 S.W.3d at 202.

And even after such a petition is filed, termination is not mandatory. Missouri does not substitute the mere passage of time for a determination that parental rights should be terminated. Termination can only occur if a circuit court finds that extended foster care opens the door to termination *and* the court then "finds that the termination is in the best interest of the child." § 211.447.5. Missouri has a "two–step procedure for terminating parental rights." *In re K.C.M.*, 85 S.W.3d 682, 690 (Mo. App. W.D. 2002).

The mother argues that termination for extended foster care is not required by the Adoption and Safe Families Act of 1997, upon which Missouri's law is based. But the federal law does not prohibit the states from making extended foster care a ground for termination. *See* Pub. L. 105–89, § 103(a)(3)(E); 111 Stat. 2115, 2118; 42 U.S.C. § 675(5)(E).[3] And, like Missouri's law, the federal law is intended to promote adoptions of children languishing in foster care. Congress intended for termination petitions based upon extended foster care "to increase the number of adoptions" and "to produce a substantial increase in adoptions in the years ahead." H.R. Rep. 105–77, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2739–2740.

The mother also argues that termination for extended foster care bears no logical relationship to parental unfitness. But Missouri can construe its statute, as Oklahoma has done, to require culpable parental responsibility for extended foster care. Such a construction would be in accord with a finding that the state has

[3]States wishing to receive federal funding for foster care and adoption assistance must have a state plan that provides for a case review system that includes filing a termination petition when, with certain exceptions, a child has been in foster care for 15 of the most recent 22 months. *See* 42 U.S.C. § 671(a)(16); 42 U.S.C. § 675(5)(E).

provided parents with reasonable efforts to make it possible for their children to return home. *See* §§ 211.183.1, 211.447.3(3).

Finally, the mother argues that termination for extended foster care violates her substantive right to the care, custody, and control of her children. But if termination itself were to amount to a constitutional violation, parental rights could never be terminated. The mother does not specify what procedural right she was due, and not afforded, before her rights were terminated.

C. Other states have found termination for extended foster care to be constitutional

The Indiana court of appeals has refused to apply strict scrutiny to Indiana's extended foster care statute because the statute does not significantly interfere with family integrity. The Indiana statute merely sets a "benchmark for additional involvement of the judicial process" — the parents of a child placed out of the home for the requisite period of time, "during which they have appeared at a number of hearings on the issue," must appear in court one more time for a determination of the best interests of the child. *Phelps*, 736 N.E.2d at 817–18.

Indiana's statute is constitutional because it "seeks to facilitate adoptions, instead of endless foster care placements," by setting a "fifteen–month benchmark," at which a petition to terminate parental rights is filed. *Phelps*, 736 N.E.2d at 818; *see*

also James v. Pike County, Ind., Office of Family & Children, 759 N.E.2d 1140, 1143 (Ind. App. 1st Dist. 2001).

> Although the filing of such a petition is certainly not a matter to be taken lightly, it does bear a rational relation to the State's very legitimate interest in promoting adoptions of children who have been removed from their parental homes for extended periods of time. The Indiana statute, with the protections outlined above, does not violate the Due Process Clause.

Phelps, 736 N.E.2d at 818. Among those protections is that after the petition is filed, a hearing must be held to determine whether termination is in the best interests of the chid. *Id*.

As the Indiana statute merely provides a "benchmark" for additional judicial involvement, Nebraska's extended foster care statute merely provides a "guideline" for the time required for parental rehabilitation. *In re Ty M.*, 655 N.W.2d 672, 692 (Neb. 2003). The statute does not violate due process because "adequate safeguards are provided to ensure that parental rights are not terminated based solely upon the length of time children are in out–of–home placement." *Id*. Among those safeguards is that if it is proven that the requisite period of time has expired, it must also be proven that termination of parental rights is in the best interests of the child. *Id*. The state's

interest promoted by extended foster care statutes has been eloquently stated by the Nebraska Supreme Court:

> Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. The concept of permanency is not simply a "buzzword," as [the parent] contends, but rather, a recognition that when there is no reasonable expectation that a natural parent will fulfill his or her responsibility to a child, the child should be given an opportunity to live with an adult who has demonstrated a willingness and ability to assume that responsibility *and* has a permanent legal obligation to do so.

In re Sunshine A., 602 N.W.2d 452, 460 (Neb. 1999).

The "plain purpose" of Oklahoma's extended foster care statute "is to protect children from extended foster care." *In re M.C.*, 993 P. 2d 137, 139 (Okla. Civ. App. Div. 2 1999) (statute improperly applied retroactively). But the statute "is not a strict liability statute" because the "defense" that termination is not in the child's best interests remains available to the parent; "termination is permissive, not mandatory." *In re T.M.*, 6 P.3d 1087, 1093 (Okla. Civ. App. Div. 1 2000) (statute not applied retroactively); *see In re M.J.*, 8 P.3d 936, 939 (Okla. Civ. App. Div. 3 2000) ("we see nothing ... proscribing a parent's presentation of defensive matters otherwise available

in proceedings under provisions other than the fifteen–of–twenty–two–month section"). Indeed, Oklahoma has construed its statute to require a showing of culpable parental responsibility for placement in foster care for the requisite period of time. *See In re C.R.T.*, 66 P.3d 1004, 1012 (Okla. Civ. App. Div. 2 2003) ("extended foster care per se does not create a stand alone basis for termination of parental rights").

The Illinois Supreme Court found an Illinois Adoption Act statute unconstitutional. But there, extended foster care was more than a trigger for initiating action. That statute created a presumption of parental unfitness based upon the child's being in foster for 15 months out of any 22 month period, rebuttable by the parent showing it is more likely than not it will be in the child's best interests to be returned to the parent within 6 months of the date the termination petition was filed. *See In re H.G.*, 757 N.E.2d 864, 871(Ill. 2001); 750 ILCS 50/1(D)(m–1) (West 1999). The Indiana, Nebraska, and Oklahoma statutes have no similar provision, and, as shown above, neither does the Missouri statute. In fact, the statute the Illinois court struck down is not Illinois's counterpart to the Indiana, Nebraska, Oklahoma, and Missouri statutes, or for that matter the federal statute. Illinois's statute requiring filing of a termination petition for extended foster care is contained in the Illinois Juvenile Court Act and states that the children and family services department shall request the state's attorney to file a termination petition if "a minor has been in foster care ... for 15 months of the most recent 22 months." 705 ILCS 405/2–13 (4.5)(a)(i)

(West1999). The Illinois Supreme Court was aware of this Juvenile Court Act statute and distinguished it from the constitutionally infirm Adoption Act statute by saying the infirm statute "goes a step further." *In re H.G.*, 757 N.E.2d at 866.

For these reasons, termination of the mother's parental rights upon the ground of extended foster care does not violate due process.

II.

Though the question has not been preserved for appellate review, the circuit court properly terminated the mother's parental rights in compliance with due process when the juvenile officer took temporary protective custody of the children based upon a reasonable suspicion of neglect and filed a neglect petition, the circuit court entered a protective custody order to which the mother consented in writing seven days later, the mother did not take any further action until nearly two years later when termination proceedings were about to begin, but never sought to compel or even request the circuit court or the Division of Family Services to comply with statutory time lines or to return her children. (Responds to appellant's arguments II a, b, c, d, e, f, g, h, i, j, and k.)

A. Failure to preserve for appellate review

To preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity, usually in a responsive pleading. *See In re T.E.*, 35 S.W.3d 497, 504–505 (Mo. App. E.D. 2001) (constitutionality of reasonable efforts, termination upon consent of parent, and social summary statutes not raised until on appeal)*; In re R.H.S.*, 737 S.W.2d 227, 233–34 (Mo. App. W.D. 1987)

(constitutionality of statutory ground for termination not raised until after judgment). For the first time in this case, the mother asserts on appeal that the circuit court violated her due process and freedom of religion and statutory rights so that the termination of her parental rights should be vacated. At this time, it is too late to preserve any issue for review, particularly constitutional issues.

B. The juvenile officer had reasonable suspicion of neglect

The mother essentially argues that a child can never be removed from its family home without a court order finding exigent circumstances. (Appellant's Br. at 43–44.) This is not good Fourth Amendment law, let alone Fourteenth Amendment law, which is the foundation of the mother's liberty interest in familial relations. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

"The liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves ... The parental liberty interest in keeping the family unit intact is not a clearly established right in the context of reasonable suspicion that parents may be abusing children." *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505, 510, 511 (8th Cir. 1995) (reasonable suspicion of abuse allowed state social workers to suggest that mother seek judicial relief against father); *see also Lux by Lux v. Hansen*, 886 F.2d

1064, 1067 (8th Cir. 1989) (reasonable suspicion of abuse allowed state social workers to initiate neglect proceeding).

The juvenile officer had a reasonable suspicion that the children were neglected that allowed her to remove them from the mother's home for their own protection. In spite of instructions to Gloria to keep the father away from the children, the father who had sexually abused G.O. continued to come around the trailer home and when Family Services would come to the home, would either leave or run them off. (Tr. 201–203, 208–209, 274–276.) In spite of an intensive home services program to keep the children from coming into custody, the issues posing a threat to the children remained. Those issues included, in addition to the father coming around the home, the filthy home and yard, the children's head lice, and lack of school attendance and childhood disease inoculations. (Tr. 196–198, 200–201, 205, 207, 210–212.) The thirty–four photographs taken of the trailer home and yard (Pet'r Exs. 13A and 13B) relate better than words the condition of the home and yard.

The mother's reliance upon *Brokaw v. Mercer County*, 234 F.3d. 1000 (7th Cir. 2000) is misplaced. *Brokaw* is a Fourth Amendment case where the child himself sued for unlawful seizure. *See id*. at 1006. In any event, the court recognized that a child may be removed from the home based upon probable cause. *See id.* at 1009–10.

C. The circuit court properly entered a protective custody order

Circuit court authority to remove children from the custody of their parents arises from a petition for neglect. A neglect petition couched in the language of the statute defining jurisdiction "is adequate to vest jurisdiction to enter custody orders." *In re Trapp*, 593 S.W.2d 193, 199 (Mo. banc 1980); *see also In re A.A.R.*, 71 S.W.3d 626, 632 (Mo. App. W.D. 2002). The statute defining neglect jurisdiction states that the circuit court shall have exclusive original jurisdiction in proceedings involving any child alleged to be in need of care and treatment because the parents "neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his or her well–being." § 211.031.1(1)(a), RSMo 2000. The petition is couched in the language of the neglect statute. (L.F. 11–12.)

The circuit court did not need to make reasonable efforts[4] findings in its protective custody order. Section 211.183 "governs the order of disposition." *In re A.H.*, 45 S.W.3d 899, 900 (Mo. App. E.D. 2001). Reasonable efforts findings are made in an order entered under the dispositional statute. *See* § 211.181, RSMo 2000.

[4]States wishing to receive federal funding for foster care and adoption assistance must have a state plan that provides for making reasonable efforts to preserve families. *See* 42 U.S.C. § 671(a)(15).

Only one type of disposition — children adjudicated delinquent with "commitments to the division of youth services" — is excepted from reasonable efforts findings. § 211.183.5, RSMo 2000; § 211.181.3. But even if reasonable efforts findings were required to be made in the protective custody order, the mother's consent to having her children temporarily removed from her custody makes them unnecessary.

The mother affirmatively consented to the jurisdiction of the circuit court over her children and her self. *See A.A.R.*, 71 S.W.3d at 628 (oral consent to jurisdiction over children); *In re T.N.H.*, 70 S.W.3d 2, 8–9 (Mo. App. E.D. 2002) (appearance and participation in proceedings submits oneself to jurisdiction of court). Seven days after the circuit court entered a protective custody order, the mother filed with the court a signed statement in which she waived service of summons, entered her appearance, and consented to having her children temporarily removed from her custody. (L.F. 13–14, 16.) She does not challenge the voluntariness of that statement. Not until two years later, when Family Services began to seek termination of her parental rights, did the mother take her next action and apply for the assistance of counsel. (L.F. 1, 37, 46–47.) Counsel was appointed and has participated throughout these proceedings. (L.F. 1.)

Three years after the circuit court entered the protective custody order, it held a termination hearing. (L.F. 1, 6.) How this time span affects the termination's validity is discussed below.

D. Statutory time lines are merely directory

A tardy dispositional hearing does not divest the circuit court of jurisdiction to enter a dispositional order. *See In re D.K.S.*, 106 S.W.3d 616, 617 618–19 (Mo. App. W.D. 2003) (dispositional hearing held 34 months after child removed from parent's custody). Likewise, a tardy dispositional hearing does not invalidate a subsequent termination. *In re L.L.E.*, 839 S.W.2d 348, 352 (Mo. App. S.D. 1992) (17–month period without permanency hearing before petition for termination filed). Even not holding a dispositional hearing *at all* does not invalidate a subsequent termination. *D.D.C. v. B.C.*, 817 S.W.2d 940, 944 (Mo. App. W.D. 1991).

The twelve–month time line requirement of § 210.720.1 and of Rule 119.08(a) for a post dispositional review or permanency hearing [5] is directory only and not mandatory. *See D.K.S.*, 106 S.W.3d at 618. Because the legislature and this court created no "consequence for noncompliance" with the time line, there is "little more than a time after which an action for *mandamus* will lie." *Id*. (emphasis in original).

[5]States wishing to receive federal funding for foster care and adoption assistance must have a state plan that provides for a case review system that includes permanency review and status review requirements. *See* 42 U.S.C. § 671(a)(16); 42 U.S.C. § 675(5)(B), (C).

For the same reason, Family Services' every–six–months child status reports and circuit court review thereof required by § 210.730, and Family Services' thirty–day case plan and 72–hour written service plans required by 13 CSR 40–30.010(2) and 13 CSR 40–73.075(1) and (2), respectively, are also directory.

In this case, the mother took no action at all, either by mandamus or by motion before the circuit court, for a speedy adjudicatory, dispositional, or termination hearing. Nor did she ever move the circuit court to return her children. For two years after her children were removed from her custody, until Family Services decided to seek termination of her parental rights, the mother was content with her children remaining in foster care. For that reason, the mother's reliance on *Wishman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997) for her argument that due process requires the state to initiate prompt, judicial, post deprivation proceedings is misplaced. There, the mother and grandmother never consented to circuit court jurisdiction over the child and repeatedly requested that the child be returned to their custody. *See Wishman v. Rinehart*, 119 F.3d at 1307–08.[6]

[6]Also because the mother consented to having her children temporarily removed from her custody, the circuit court did not need to inform her that she could have a hearing, at her request, on whether it was necessary to continue them in protective custody. *See* Rule 111.14(a), (c).

E. Religious matching placement

The mother argues that the trial court established a religion and violated the religious matching statute by permitting Family Services to place the children in a foster home of a different religion from the mother. This argument, like the next one, appears to be an anticipatory swipe at the adoption proceeding. The statute refers to circuit court placement or commitment of a child in the custody of an individual or of a private agency or individual "whenever practicable" — something the circuit court did not do in this termination proceeding, but may well be do in the adoption proceeding. § 211.221, RSMo 2000. In any event, the statute is "advisory and directory," not mandatory, and tips the balance in favor of placement in same–religion households only when all the temporal factors are in balance. Failure to comply with a directory statute that has no application to the facts of this case could not justify setting aside the termination.

F. Actual notice of adoption proceeding

The mother argues that the foster parents denied her due process by failing to notify her of her right to counsel in the summons issued in the adoption proceeding. She was notified of her right to counsel in the summons issued in the termination proceeding. (L.F. 1, 43.) The mother forthrightly acknowledges that she was not harmed by this failure because her counsel was aware of the adoption proceeding,

entered her appearance in the adoption proceeding, and the termination and adoption proceedings were consolidated. The mother and the foster parents have not prosecuted the adoption proceeding, apparently waiting for resolution of this termination. For these reasons, the mother's reliance on *B.L.E.*, 723 S.W.2d 917 (Mo. App. W.D. 1987) is misplaced. There, the parent was never advised of the right to counsel and never had counsel at the termination proceeding. Only extreme and empty formalism could justify setting aside a termination initiated by the state for the prospective adoptive parent's inconsequential error.

For these reasons, the circuit court properly terminated the mother's parental rights in compliance with due process.

III.

Though the question has not been preserved for appellate review, the word "emergency" in § 211.183.1, RSMo, deeming reasonable efforts to have been made to prevent removal from the family home when first contact with the family occurred during an emergency, is not void for vagueness because the word does not proscribe any conduct and no one is seeking to enforce against the mother a prohibition against an emergency. (Respond's to appellant's arguments 2 a and 3.)

A. Failure to preserve for appellate review

To preserve a constitutional issue for appellate review, a party must raise the issue at the earliest opportunity, usually in a responsive pleading. *See In re T.E.*, 35 S.W.3d 497, 504–505 (Mo. App. E.D. 2001) (constitutionality of reasonable efforts, termination upon consent of parent, and social summary statutes not raised until on appeal)*; In re R.H.S.*, 737 S.W.2d 227, 233–34 (Mo. App. W.D. 1987) (constitutionality of statutory ground for termination not raised until after judgment). For the first time in this case, the mother asserts on appeal that the word "emergency" in § 211.183.1 is void for vagueness. At this time, it is too late to preserve any constitutional issue for review.

B. "Emergency" is not void for vagueness

"The void for vagueness doctrine ensures that laws give fair and adequate notice of *proscribed conduct* and protects against arbitrary and discriminatory enforcement." *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999) (emphasis added). The test to determine vagueness is whether the law's language coveys to an ordinarily intelligent person a sufficiently definite warning of "proscribed conduct measured by common understanding and practices." *Id*. "Neither absolute certainty nor impossible standards of specificity are required." *Id*. Warning of the "general conduct prohibited" is sufficient. *In re Hill*, 8 S.W.3d 578, 582 (Mo. banc 2000) (canons requiring judges to act in a manner that promotes public confidence in integrity and impartiality of judiciary and prohibiting them from lending the prestige of their offices to advance private interests, give adequate notice); *see also Doe v. Missouri Dept. of Social Services*, 71 S.W.3d 648, 651 (Mo. App. E.D. 2002) (term "well–being" in § 210.110(9), defining "neglect" as failure to provide care necessary for child's well–being, "adequately described the proscribed conduct").

The void for vagueness doctrine does not apply to the word "emergency" in § 211.183.1 because the word and the statute containing it does not set forth any proscribed conduct, nor is anyone seeking to enforce against the mother a prohibition against an emergency. The statute merely requires circuit courts, when entering

disposition orders, to find whether Family Services made reasonable efforts to prevent removal of the child from the family home. *See In re A.H.*, 45 S.W.3d 899, 900 (Mo. App. E.D. 2001); § 211.183.1, RSMo 2000. And if the first contact with the family occurred during an emergency, the statute deems that Family Services has made reasonable efforts. *See* § 211.183.1. The mother's reliance on *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) is misplaced because there the vagrancy statute proscribed conduct.

In this case, the statute that proscribes conduct is the *neglect* statute, § 211.031.1(1)(a). But the mother does not challenge the adequacy of notice provided by the allegations of the petition for neglect except that she uses those allegations to support her argument that no immediate life–or–limb–threatening emergency existed. (Appellant's Br. at 70, 73–74.)

The standard for constitutional adequacy of notice in a neglect proceeding is "notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Trapp*, 593 S.W.2d at 198, quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *see also In re D.K.S.*, 106 S.W.3d 616, 620 (Mo. App. W.D. 2003); *A.A.R.*, 71 S.W.3d at 631. In *Trapp*, the allegations of the neglect petition were conclusory — "couched in the language of the statute defining the juvenile court's jurisdiction." *Trapp*, 593 S.W.2d at 199. The petition alleged that the mother

neglected to provide the children with proper support, education required by law, medical, surgical, or other necessary care for the children's well being, that the children were otherwise without care, custody or support, and that the behavior, environment or associations of the children are injurious to their welfare. *See Trapp*, 593 S.W.2d at 195. This language tracked the language of the neglect statute. *See* 211.031.1(1). And this language was sufficient to provide the mother with constitutional notice — it notified her of the pendency of a custody proceeding and of the "charges" of neglect she would need to defend. *See Trapp*, 593 S.W.2d at 198; *see also D.K.S.*, 106 S.W.3d at 620; *A.A.R.*, 71 S.W.3d at 631.

In this case, also, the language of the petition tracks the language of the neglect statute — the mother neglected to provide the care and support necessary for the children's well–being. (L.F. 11.) As that language is sufficient to vest jurisdiction in the juvenile court to enter custody orders, that language is sufficient to notify the mother of the pendency of a custody proceeding and of the "charges" of neglect she would need to defend. No fact–specific or particularized pleading is constitutionally required. The additional language — the children suffer from chronic head lice resulting in their missing numerous days of school, the home has soiled clothes and dirty dishes piled on the floor, food on the carpet, and filth throughout, and the mother does not follow through on medical treatment (L.F. 11–12) — is necessary to comply with the pleading requirements of Rule 114.01 and § 211.091, RSMo 2000, that are

intended only to clarify the basis of juvenile court jurisdiction. *See Trapp,* 593 S.W.2d at 199; *D.K.S.*, 106 S.W.3d at 620 n. 2; *A.A.R.*, 71 S.W.3d at 636.

For these reasons, the word "emergency" is not void for vagueness.

IV.

The circuit court properly terminated the mother's parental rights when the mother 1) abandoned her children by not paying child support and by not personally contacting her caseworker to arrange for visitation, 2) abused and neglected her children by a) failing to provide financial support, a home and personal cleanliness at minimum community standards, medical care, basic childhood immunizations, and enrollment in school or home schooling and b) not seeking immediate medical care for a severe act of physical abuse committed by the father leading to the loss of sight in one of P.O.'s eyes, and 3) failed to rectify the conditions that led to the assumption of jurisdiction that have existed for one year by not cooperating and participating in social services plans, and 4) when the trial court found that termination is in the children's best interests. (Responds to appellant's arguments IV and II l and m.)

A. Standard of review

This court must affirm a judgment terminating parental rights unless the judgment is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *See In re W.B.L.*, 681 S.W.2d 452, 454 (Mo. banc 1984); *In re K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. W.D. 2002). Deferring to the trial court's credibility determinations, the reviewing court considers all the evidence and reasonable inferences from the evidence in the light most favorable to the judgment. *See In re K.C.M.*, 85 S.W.3d at 689*; In re N.R.W.*, 112 S.W.3d 465, 468 (Mo. App. W.D. 2003). This standard of review on appeal is not inconsistent with the clear, cogent, and convincing standard of proof at trial of the grounds for termination. *See In re W.B.L.*, 681 S.W.2d at 454; *In re K.C.M.*, 85 S.W.3d at 689.

The standard of proof at trial of whether termination is in a child's best interests is a preponderance of the evidence. *See In re K.C.M.*, 85 S.W.3d at 690. Therefore, the standard of review on appeal of a best interests determination is an abuse of discretion. *See In re K.C.M.*, 85 S.W.3d at 689.

In this case, the mother argues only that the trial court's findings that grounds for termination exist and that termination is in the children's best interests are not supported by substantial evidence. If multiple grounds for termination exist, any one ground is sufficient to sustain the judgment. *See In re E.L.B.*, 103 S.W.3d 774, 776 (Mo. banc 2003) (affirmed on abandonment ground); *In re K.C.M.*, 85 S.W.3d at 689

(affirmed on extended foster care ground). The mother concedes that her children were in foster care for 15 of the most recent 22 months. (Appellant's Br. at 76.) And there is substantial evidence to support abandonment, abuse and neglect, and failure to rectify. So is the best interests finding supported by substantial evidence.

B. Abandonment

The trial court found that the mother abandoned the children, who were over one year old at the time the petition was filed, by leaving the children, for a period of at least six 6 months without good cause, without any provision for parental support and without making arrangements to visit or communicate with them although able to do so. (L.F. 136.) This is a finding of abandonment under § 211.447.4(1)(b), RSMo. *See In re E.L.B.*, 103 S.W.3d at 776–777; *In re C.M.D.*, 18 S.W.3d 556, 561 (Mo. App. W.D. 2000).

Abandonment is an issue of the intent of the parents, inferred from evidence of their conduct. *See In re W.B.L.*, 681 S.W.2d at 455; *In re N.R.W.*, 112 S.W.3d at 469 (abandonment of child less than one year old under §211.447.2(2)(b)). Intent to abandon may exist even if children are involuntarily removed from the parents when lack of parental involvement goes beyond what is attributable to enforced separation. *See In re N.R.W.*, 112 S.W.3d at 469. Parents are not allowed to maintain only a superficial or tenuous relationship with their children in order to avoid a determination

of abandonment. *See In re C.M.D.*, 18 S.W.3d at 562. Therefore, a trial court may attach "little or no weight to infrequent visitations, communications, or contributions." § 211.447.4, RSMo 2000; *see In re C.M.D.*, 18 S.W.3d at 562.

The trial court further found that the mother has been employed during periods of time since the children came into care, one time for 11 months, and that in July 2001, a finding of financial responsibility was entered against the mother obligating her to pay $109.00 per month child support for her four children in foster care. (L.F. 137.) The court found that the mother made only one payment after the support order was entered and the petition for termination filed. (L.F. 137.)

Failure to pay child support is evidence from which to infer parental intent to abandon. *See, e.g., In re E.L.B.*, 103 S.W.3d at 777; *In re N.R.W.*, 112 S.W.3d at 471; *In re C.M.D.*, 18 S.W.3d at 562. Even incarceration, which results in a substantial reduction in wages, does not discharge a parent's obligation to provide financial support for their children. *See In re C.M.D.*, 18 S.W.3d at 562. In this case, after the children were removed from the home, the mother was employed as a home health aide for 11 months, but did not expend any resources on medical insurance for the children, clothing, school supplies, or lunch money. (Tr. 221, 260, 711, 810–811.) Also, in July 2001, a child support order was issued in the amount of $109.00 per month. (Pet'r Ex. 1.) The mother made one $109.00 payment in March 2002 after the termination petition was filed in January 2002. (Tr. 365; L.F. 53.)

The trial court finally found that the mother's last visitation occurred in March 2001 and since that time, she left messages and sent letters requesting visitation. (Tr. 136.) Family Services sent repeated requests to the mother to schedule meetings with the case worker to discuss her case and visitation, but for months, the mother "failed to make the effort to schedule an appointment to discuss visitation." (L.F. 136.)

Failure to exercise visitation also is evidence from which to infer parental intent to abandon. *See, e.g., In re E.L.B.*, 103 S.W.3d at 777; *In re N.R.W.*, 112 S.W.3d at 471; *In re C.M.D.*, 18 S.W.3d at 563. In this case, from September 1999 to October 2000, the mother visited S.O. and P.O. under the supervision of a lay person for 1 hour per week. (Tr. 51, 113, 115, 222.) The mother would occasionally miss visits at the beginning of this period of time, but would miss visits more frequently later on. (Tr. 117.) The girls would get sick and sad and gloomy on visitation days and miss school. (Tr. 116.) Because of the girls' physical symptoms upon visitation, in October of 2000 the girls' first treating psychologist suggested that the mother's visitation occur at her office so she could observe their interaction and offer therapy. (Tr. 51, 106.) The psychologist scheduled visitation the same day and place every week, but the mother did not really participate. (Tr. 52, 107.) The mother did not attend regularly, would not call ahead or reschedule, and when she did attend, she would arrive late. (Tr. 52.)

Because of the girls' continued physical symptoms upon visitation, which the psychologist thought were caused by the girls' guilt over not wanting to see their mother, in March 2001 the psychologist recommended that visitation with the mother cease. (Tr. 61–62, 107).

The mother acquiesced to ending visitation. The mother's counsel did not file a motion to renew visitation until January 25, 2002, just before the original petition for termination was filed on January 31, and an amended motion for visitation on February 4, but apparently never called the motion up for hearing. (L.F. 2–3 50, 53.) The trial court, though it ruled numerous other motions by the mother (L.F. 4), never ruled or even took the amended motion for visitation under submission.

And, contrary to the mother's argument, Family Services did not absolutely refuse to allow visitation, but insisted that the mother personally contact her caseworker to arrange for visitation.[7] This the mother would not do. Unlike the case of her two older children, R.O. and E.O., the mother was uncooperative in setting up visitation with P.O. and S.O. and would not respond to letters requesting that she

[7]Because Family Services did not absolutely disallow visitation, it did not violate 13 CSR 40–73.075(4), requiring it to develop written visitation policies allowing visitation unless prohibited by court order.

contact Family Services personally, but only send letters saying she wanted visitation without proposed dates or times. (Tr. 346–357.) Beginning in March 2001 and ending in July 2002, Family Services sent the mother some twenty letters requesting cooperation, of which four requested personal contact to arrange visitation. (Tr. 489–495; Pet'r Ex. 20 pp. 5, 8, 15, 18.) For example, on August 16, 2001, Family Services wrote: "Please be advised that visits will no longer be allowed until you contact me and schedule a time to come in and discuss your case." (Pet'r Ex. 20 p. 8.) And on January 28, 2002, Family Services wrote: "Since you do not have a phone, I would like to request that you call or come into the office at your earliest convenience so that we can discuss what dates and times you would be available to visit your children." (Pet'r Ex. 20 p. 15.)

Only in February 2002, a year after visitation ceased and shortly after the termination petition was filed, did the mother personally contact her caseworker to establish visitation. (Tr. 366.) But that visit was cancelled after the girls became so anxious that their guardian ad litem requested cancellation. (Tr. 366.)

In addition, the mother would try to visit the children at places and times that were unsupervised, such as at their school or church. (Tr. 233–234, 774–775, 808.)

Finally, the mother would use her letters to the girls to manipulate them into feeling guilty about being separated from her by containing statements that implied the

girls or the mother were in a situation of distress. (Tr. 503, 509–511, 515, 521–524.)

For these reasons, there is substantial evidence that the mother abandoned her children.

C. Abuse and neglect

Termination of parental rights upon the ground of abuse or neglect requires the trial court to "consider and make findings" on each of four "conditions or acts of the parent." § 211.447.4(2), RSMo 2000. Substantial evidence of only one condition or act is sufficient to support termination. *In re Q.M.P.*, 85 S.W.3d 654, 658–659 (Mo. App. W.D. 2002). In this case, the trial court found that the children have been abused or neglected (L.F. 137) and that the mother abused and neglected her children under two of the four conditions or acts of the parent. (L.F. 138–139).

The mother's reliance on *In re B.C.K.*, 103 S.W.3d 319 (Mo. App. S.D. 2003) is misplaced because in that case termination was based solely on a prior adjudication of abuse or neglect under § 211.031, RSMo.[8] In this case, as shown below, there is

[8]A trial court no longer needs to find that there has been a prior adjudication of abuse or neglect to terminate parental rights for abuse or neglect. *See In re B.C.K.*, 103 S.W.3d at 328 n. 10; § 211.447.4(2); § 211.447.2(2), RSMo 1994 (repealed). In this case, the trial court, nevertheless, found that the children were adjudicated abused

sufficient evidence that the mother failed to provide financial support, adequate shelter, personal cleanliness, medical care, and education for her children and did not seek immediate medical care for a severe act of physical abuse committed by the father.

1. Abuse or neglect by failing to provide financial support, adequate shelter, personal cleanliness, medical care, and education

First, the trial court found that the mother repeatedly and continuously failed, although physically or financially able, to provide the children with adequate food, clothing, shelter or education as defined by law, or other care and control necessary for the children's physical, mental, or emotional health. (Tr. 139.) The trial court further found that the mother provided only one support payment since ordered to do so and that while the girls were still in her custody, she did not enroll the girls in school, did not home school the girls, did not obtain childhood immunizations, did not maintain a home at minimum standards, and permitted the girls to have frequent infestations of head lice. (L.F. 139.) This, coupled with the additional findings of

---

and neglected under § 211.031, RSMo. (L.F. 138.) In light of the mother's written consent that her children be placed in the temporary custody of the court and Family Services (L.F. 16), she affirmatively consented to the jurisdiction of the court over her children and, thus, to an adjudication that they were neglected. *See* Argument II. C.

abuse and neglect detailed below, is a finding of abuse or neglect under § 211.447.4(2)(d). *See In re Q.M.P.*, 85 S.W.3d at 659–660; *In re A.S.*, 38 S.W.3d 478, 482 (Mo. App. S.D. 2001); *In re T.E.*, 35 S.W.3d 497, 502 (Mo. App. E.D. 2001); *In re S.L.N.*, 8 S.W.3d 916, 923 (Mo. App. S.D. 2000).

The trial court also found that the mother neglected the medical needs of P.O., leading to blindness in one of her eyes, when the father threw a car part into her eye. (Tr. 137.) The mother refused to pursue medical treatment both at the time of the incident and later with follow–up treatment. (Tr. 137.) In August, the mother told a physician that the incident occurred in April. (Tr. 137.) And while P.O. was still in her care, the mother failed to make follow–up appointments, reschedule, or attend appointments. (Tr. 137.)

The trial court found that though repeatedly advised of the need for immunizations by medical providers and Family Services' workers, the girls did not receive immunizations until August 24, 1999, only 5 days before school started, thus preventing them from enrolling in school. (L.F. 137.) In addition, the mother was aware of the need for immunizations because her seven older children all attended public school and had immunizations. (L.F. 137.)

The trial court found that though the mother was advised in 1999 of the need for P.O. to be in a structured, full–time educational setting to address her special needs, the girls were not enrolled in school or being home schooled. (L.F. 138.)

When the girls were placed in protective custody, they were enrolled in school and tested to evaluate their needs, and P.O. tested at the cognitive level of a 4 year old, was unable to recite the alphabet and recognize her own name and basic colors. (L.F. 138.) S.O. was placed in a grade level below her chronological age. (L.F. 138.)

The trial court found that the parental home was below minimum community standards with dirty clothes on the floor, dirty dishes about, food on the carpet, and generally filthy. (L.F. 138.) The yard contained cars on blocks that were unstable and posed a threat of harm for the children and an unoccupied mobile home that was in poor repair and falling down. (L.F. 138.) There was frequent and continuing problems with head lice. (L.F. 138.)

Abuse or neglect can be inferred from failure to obtain medical care, including childhood immunizations. *See In re J.L.M.*, 64 S.W.3d 923, 925–926 (Mo. App. S.D. 2002) (medical care); *In re J.L.F.*, 99 S.W.3d 15, 18 (Mo. App. S.D. 2003) (immunization). The history of P.O.'s eye injury that the mother related to a physician on August 25, 1997, relates that "pt was hit with something in right eye back in April, not sure maybe metal was seen @ Freeman ER treated for some discharge was told no damage." (Pet'r Ex. 7 p. 7.) The mother's history that P.O. was seen in April at the Freemen Hospital emergency room, x–rayed, and told there was no damage is not supported by the medical records. No such records exist. The evidence supports that there was no April visit to the hospital or x–ray and that the

mother's history that P.O. was hit in the right eye by a piece of metal back in April is accurate. P.O. told her first foster mother, Kathy Ginger, that her father threw a motor part at her when she was riding her bike and it hit her in the eye. (Tr. 163.) She also told Ginger that they did not go to the hospital because her father would get into trouble, and they would not get any more money from him. (Tr. 163.) Ginger testified that she took P.O. to three doctors, who told her that P.O.'s eye was treatable when the injury occurred, but not now. (Tr. 163–164.) P.O. has a metal sliver in her eye and a detached retina. (Tr. 165–166.) She wears glasses to protect her uninjured eye, and she may lose her injured eye at some point because it is prone to infection. (Tr. 165–166.) A picture of P.O.'s eyes is at page 5 of Petitioner's Exhibit 7.

The physician who saw P.O. in August scheduled an appointment in Kansas City with a Dr. Cibis at the Children's Mercy Hospital, but the mother cancelled the appointment and never rescheduled. (Tr. Pet'r Ex. 7 p. 7; Tr. 742.)

In addition, when both girls came into custody, they had lots of dental decay, especially S.O. who had to be anesthetized to put on numerous caps. (Tr. 159–169.) The mother claimed to have gotten P.O. and S.O. their inoculations against childhood diseases, but had not. (Tr. 211–212.) She did not get them until after school had started and her other children were in school. (Tr. 793–795.) The Family Services' caseworker picked lice out of all the children's hair herself "for hours," picked up the

older children from school when they were sent home for lice and got shampoo for them, all to no avail. (Tr. 197, 201, 200, 205, 211.)

Abuse or neglect can be inferred from failure to educate children. *See In re H.P.*, 815 S.W.2d 143, 145 (Mo. App. E.D. 1991) (termination for failure to rectify). The mother claimed to be home schooling P.O. and S.O., but was not, and would not let Family Services' caseworker place P.O. in a private school to ease her into the public school system. (Tr. 205, 207.) She had been advised that P.O. needed full time special education. (Tr. 789–790.)

When both girls came into custody they underwent educational evaluations, that included intelligence tests, achievement tests, articulation tests, an for P.O. an adaptive behavior skills test measuring her daily living skills. (Tr. 136.) Both girls had multiple articulation errors; P.O. received speech therapy for three years, and S.O. for a lesser period of time. (Tr. 137.) S.O. did not test mentally retarded. (Tr. 153.) P.O., however, tested moderately mentally retarded with an intelligence quotient of 48 and an adaptive quotient of 52. (Tr. 137.) P.O., who was nine years old, was at the four–year–old level academically. (Tr. 139.) She could not recite the alphabet, could not recognize her name in print, could not add or subtract single digit numbers, counted with her fingers, and did not know her letters or even colors. (Tr. 139, 162.)

The girls' first treating psychologist opined that S.O. was borderline mentally retarded and that P.O. and S.O. performed at these levels because of a lack of verbal skills and formal education, not because of any organic condition. (Tr. 44–46, 107.) When the girls were placed in public school, S.O. was placed a year behind her chronological age level. (Tr. 140.) P.O. was given a one–on–one para–educator who worked with her alone for two to three hours a day. (Tr. 142.) By trial, P.O. had made strides, but she read at a late second, early third grade level. (Tr. 144.) She still was not at grade level. (Tr. 142.) Due to her increasing physical maturity, she was placed in the fifth grade; academically, she should have been in fourth grade, and chronologically, she should have been in sixth. (Tr. 143.–144) She was removed from regular classes for speech therapy for twenty minutes two times a week. (Tr. 148.)

Abuse or neglect can be inferred from a filthy and dangerous home environment. *See, e.g.*, *In re T.E.*, 35 S.W.3d at 503. In this case, when the first foster mother got the girls, they were dirty. (Tr. 159.) P.O. told her foster mother that "our house was filthy," "roaches all over," and "mice." (Tr. 166–167.) P.O. told her that a lot of times they did not have food, and S.O. told her that one of their older brothers was nice because he took them out to eat when they did not have food in their house. (Tr. 167.)

The children came into custody in part because of the condition of the trailer home — falling down and unstable, soiled clothes and dirty dishes piled on the floor, food on the carpet and filth throughout the home — and the yard — cars on blocks causing a danger to playing children. (Tr. 214; Pet'r Ex. 14 p. 1–2.) Thirty–two photographs of the condition of the trailer and the yard are in the record. (Tr. 14–19, 218–219; Pet'r Ex. 13A and 13B.)

After the children came into custody, Family Services' caseworker helped the mother get a new trailer. (Tr. 196.) Her old trailer had holes in the floor, things crammed everywhere, just a walking space through it, and no sleeping space for the children. (Tr. 198.) Family Services made two trailer payments for her. (Tr. 198.) But her new trailer eventually became "filthy." (Tr. 207, 210.) At one point, the mother had a bulldozer out to clean up her yard. (Tr. 723.)

The mother still did not maintain her trailer and her yard, would not let either of her two Family Services' caseworkers into the trailer or answer her door. (Tr. 229–234.) One caseworker made monthly visits, but decided it was fruitless because the mother would not answer the door. (Tr. 340–341.) She obtained entry to the home only upon announced visits made by certified letter. (Tr. 341.) The first such announced visit was in September 2001. (Tr. 342.) The home was cluttered, but livable; the outside was picked up. (Tr. 342.) She never again obtained access to the home until another pre–arranged visit in February 2002. (Tr. 343.) The home was

livable; the outside still needed work, skirting around the trailer, garbage behind it and a car needed to be picked up. (Tr. 344.) After then she tried to make home visits but was unsuccessful. (Tr. 349.)

By trial, the home again had become unlivable, emitting a smell, clutter piled up, and towels over the doorway, and the electricity turned off. (Tr. 380–381.)

Abuse or neglect can be inferred from failure to financially support children. *See, e.g.*, *In re Q.M.P.*, 85 S.W.3d at 660; *In re A.S.*, 38 S.W.3d at 484, 486; *In re S.L.N.*, 8 S.W.3d at 923. In this case, the evidence of the mother's lack of financial support of her children is set forth above in B. Abandonment.

2. Abuse or neglect by not seeking immediate medical care for a severe act of physical abuse

Second, the trial court found that the mother did not seek immediate medical care for an injury to P.O.'s eye when the father committed a severe act of physical abuse by throwing a car part into the eye. (L.F. 138–139.) This, coupled with the additional findings detailed above about medical care for P.O.'s eye, is a finding of abuse or neglect under § 211.447.4(2)(c), RSMo. *See In re T.H.*, 980 S.W.2d 608, 612 (Mo. App. W.D. 1998) (sufficient evidence for termination where mother twice lied about her knowledge that father spanked child in another room with stick breaking her leg and admitted her knowledge only after child told authorities). Though the mother did not commit any act of physical abuse on P.O. or S.O., she knew of the

father's severe act of abuse of throwing a motor part and hitting P.O. in the eye with it. Her truthful history related to the physician in August that P.O. was hit in the eye in April with something metal, along with her false history that P.O. was examined in April and told there was no damage, shows that the mother was aware of the abuse. So does P.O.'s statement to Kathy Ginger that they did not go to the hospital for the eye because the father would get into trouble and they would no longer get any money from him. See above for a fuller discussion of the mother's failure to obtain immediate medical care for the abuse and its consequences.

For these reasons, there is substantial evidence that the mother abused or neglected her children.

D. Failure to rectify

The trial court found that the mother failed to rectify the conditions that led to the assumption of jurisdiction over her children. *See* § 211.447.4(3), RSMo 2000; *In re A.S.*, 38 S.W.3d 478, 483 (Mo. App. S.D. 2001); *In re T.E.*, 35 S.W.3d at 502; *In re A.M.C.*, 32 S.W.3d 155, 159 (Mo. App. W.D. 2000).

1. Harmful conditions that led to the assumption of jurisdiction continue to exist

First, the trial court found that the children have been under the jurisdiction of the court for a period of one year or longer and that the conditions that led to the assumption of jurisdiction still persist and/or that conditions of a potentially harmful nature continue to exist. (Tr. 139.) The trial court expanded on these findings by finding that the children entered care September 2, 1999, and at trial had been in foster care for just over 36 months. (Tr. 139.) At the time of removal, the home was filthy with trash and debris inside and out, medical care and educational needs were not being met, and the mother was not preventing the children from having contact with the father despite his physical and sexual abuse of the children. (Tr. 139.) The evidence supporting these findings has been detailed above with the exception that the mother was not preventing contact with the father, and there is substantial evidence of that.

In April of 1997, a child abuse and neglect hot line investigator found probable cause to believe that the father had sexually abused G.O. by touching her with his hands and having sexual intercourse with her since she was in sixth grade. (Tr. 6–7, 10; Pet'r;'s Ex. 2 p. 3, 7.) Though the mother asked the father to leave the home, and he did, the father began "coming around." (Tr. 194, 561, 716–717.) Though Family Services instructed the mother not to let father have access to the children and assisted her in obtaining an ex parte order against him, the father continued to visit the

mother at her home after the ex parte order expired, even into 2002. (Tr. 201–203, 208–209, 274–276, 462–463, 604–605.)

Second, the trial court found that potentially harmful conditions existed at the time of trial and that the mother exhibits an inability to provide a safe and appropriate home for the children. (Tr. 139.) This finding, coupled with the additional findings it made detailed below, amount to a finding that there is little likelihood that these conditions will be remedied at an early date so that the children can be returned to the mother in the near future. The trial court found that at the time of trial, the mother was unable to pay her utility bills and that the electricity in the home was turned off. (Tr. 139.) The evidence supporting this finding has been discussed above.

The trial court also found that at the time of trial, the mother "exhibited a limited insight into problems, she is inflexible in her thinking, she has not taken any responsibility for her own actions or lack of actions." (Tr. 139.) Though the mother accepted responsibility for actions, the trial court found "her testimony lacking in credibility." (Tr. 139.) The trial court found that the mother told a psychologist that she saw her husband touch her children in "unfatherly ways" and that the father testified that the mother allows him to come and go as he pleases. (L.F. 140.)

The evidence supporting these findings is found in the testimony of a psychologist who conducted an evaluation of the mother shortly before trial. Tr. 385–386.) The mother's intelligence was low average, but not mentally retarded. (Tr.

388.) She was depressed and angry, and projected her anger onto others, but she was able to modify her home environment and could successfully parent. (Tr. 389–391, 396, 398.) She had good parenting skills and knew what needed to be done with children. (Tr. 392.)

However, her insight was so limited that though she saw her husband touch her children in "unfatherly ways," she did not understand that to be abuse, to be "really wrong," until 2002. (Tr. 397, 422–433.) This caused him concern about her ability to parent. (Tr. 397, 407–408, 422–423.) And the father admitted at trial that he came to the home even after the ex parte order expired to visit the children and to visit Gloria even into 2002. (Tr. 604–605, 462–463.)

The trial court also found that the mother did not tell Family Services where R.O. was when he ran away from foster care for six months, though she admitted to the psychologist that she knew where he was. (L.F. 139–140.) The evidence supporting these findings is that the psychologist testified the mother told him that R.O. had run away from foster care and that she knew where he was. (Tr. 394–395.) And the mother admitted at trial that when R.O. ran away for six months, he stayed with her or else she knew how to contact him, but would not tell Family Services how to. (Tr. 809.)

2. The mother's failure to cooperate and participate in social services plans

Third, the trial court entered a series of findings that amount to a finding on the terms of the social services plan, the mother's and Family Services' progress on those plans, and the success or failure of the Family Services' efforts to provide a proper home for the children. *See* § 211.447.4(3)(a), (b). A court must examine whether the parties have made progress to comply with the services plan. *See In re C.N.G.*, 109 S.W.3d 702, 707 (Mo. App. W.D. 2003). The trial court did just that by focusing on the efforts of both the mother and Family Services.

The trial court found that numerous social services plans were prepared and entered into, and though the mother complied with portions, she failed to make significant progress to comply with the terms. (L.F. 140.) The first caseworker entered into one written services agreement with the mother, and the second caseworker entered into four more until the mother refused to enter into any more and her attorney moved to change caseworkers. (Tr. 227–228, 335–337; Pet'r Exs. 15, 16.) Even after that, the caseworker offered three more service plans. (Pet'r Exs. 16, 19.)

The trial court found that the efforts of both the mother and Family Services to provide a proper home for the children failed because of the mother's failure to cooperate and participate in these case plans. (Tr. 142.) The trial court found that the mother went to counseling, but when no progress was made and Family Services' ceased paying for it, she stopped attending any type of therapy, including both faith

based counseling and free counseling available in the area. (Tr. 140.) The mother attended counseling, but used to complain about Family Services. (Tr. 222.) She agreed to obtain a psychological evaluation and parenting assessment, but failed to do so. (Tr. 338.) In June 2001, Family Services discontinued funding Gloria's counseling because of its length of time and lack of progress. (Tr. 349–350.) Gloria agreed there was little progress. (Tr. 350.) Counseling's goals were to help her implement the service agreement, end her reliance on other people, develop her coping skills, and improve her self esteem. (Tr. 351–352.) The second service agreement required free therapy with a counselor of Gloria's choice. (Tr. 361.) Family Services gave her some referrals, but Gloria did not follow up. (Tr. 361, 364.) She agreed to attend Alcoholics Anonymous meetings as a source of free counseling to help her become self sufficient. (Tr. 354.) She was given vouchers to have the facilitator record her attendance, but she never returned any. (Tr. 354, 364.)

The trial court found that the mother accessed services through Lafayette House, but refused to attend all classes though she was not employed then and did not lack transportation. (Tr. 141.) She did not attend even the classes she wanted to and finally stopped attending all together. (Tr. 141.) The counseling at Lafayette House was incorporated into her services agreements. (Tr. 364, 367, 373.) The mother was to attend four half days per week. (Tr. 368–369; Pet'r Ex. 17.) Alcoholics Anonymous was available nearby, and the mother agreed to attend with transportation

there offered by Lafayette House. (Tr. 369–370.) Individual therapy with a counselor was also offered. (Tr. 371.) All this was free. (Tr. 371.) Yet, In January, the mother attended only eight days, the longest being one and one–half hours. (Tr. 371–372; Pet'r Ex. 18 p. 1.) In February, she attended only five days with the longest being one hour. (Pet'r Ex. 18 p. 2). In March, she attended two days with the longest being one hour. (Pet'r Ex. 18 p. 3.) In April, she attended two days with the longest being 1 hour. (Pet'r Ex. 13 p. 5.) She did not attend in May. (Tr. 372.) In June, she attended three days with the longest being one and one–half hours. (Pet'r Ex. 18 p. 4.) She did not attend in July and August. (Tr. 373.) She did not attend alcoholics anonymous or counseling. (Tr. 374.) She did not even attend the classes her counsel said she would attend. (Tr. 376–377.) She had an automobile at this time, and transportation was not a problem since 2001. (Tr. 795–797.)

The trial court found that referrals were made for vocational rehabilitation intended to assist the mother in job training and obtaining employment and achieving independent status, but she was dropped from two programs for lack of cooperation and participation. (Tr. 140.) The third service agreement in September 2001 required vocational rehabilitation for job assessment and training. (Tr. 358.) This was substituted for employment because the mother complained that employment was too physically demanding and obtained disability payments. (Tr. 378–379.) Vocational rehabilitation was intended to assess what employment she could perform. (Tr. 379.)

The mother did this, but in December, and she was emphatic that she was not going to work. (Tr. 363–364.)

The trial court found that proof of insurance and a driver's license was required but none was provided until trial. (L.F. 141.) The mother agreed, but provided not proof that she did to Family Services before trial. (Tr. 354–355, 365.)

The trial court found that the mother attended visits, but as the children exhibited difficulty, the visits went to a therapeutic setting, and the mother made a minimal effort to attend. (L.F. 140–141.) Numerous repeated requests for meetings to discuss visitation were made, but not taken advantage of. (L.F. 141.) The evidence supporting this finding has been discussed above.

The trial court found that the mother did not meet monthly with her caseworker and allow access to her home to evaluate appropriateness and cleanliness. (L.F. 141.) The evidence supporting this finding has been discussed above. In addition, the second caseworker did not see the mother at all from May through August of 2001 with the exception of going out to see her in a car when her older daughter came to the office with a note. (Tr. 348–349, 358.) The second caseworker sent the mother some twenty letters requesting cooperation to find out what she was doing, eliminate confusion, and more efficiently provide services. (Tr. 345–346, 489–495; Pet'r Ex. 20.) The mother never really cooperated in setting up meetings. (Tr. 348–349, 355, 360.)

The trial court found that the mother did not pay child support. (L.F. 141.) The evidence supporting this finding has been discussed above.

3. Reasonable efforts for reunification

The mother argues in the second of her constitutional arguments that Family Services ceased reasonable efforts to reunify the family without first seeking court approval, in violation of the state and federal Act's reasonable efforts statutes. *See* § 211.183, RSMo; 42 U.S.C. § 671(A)(15). This argument is patently false, as demonstrated by the evidence outlined above and the evidence detailed in the Statement of Facts, particularly that part of the statement entitled Efforts to Reunify P.O. and S.O. with Mother. As demonstrated above, the trial court found that both the mother and Family Services made efforts to reunify the family, but those efforts failed because the mother failed cooperate and participate in the services plans. In any event, even if Family Services did cease reasonable efforts and made no effort to reunify the family, that would be no defense to termination. "Absence of treatment or services is no defense to a termination proceeding." *In re A.M.C.*, 32 S.W.3d at 160.

E. Termination is in the best interests of the children

The mother argues that the trial court did not make any best interests findings. This is not true. The trial court made findings on six best interests factors; the remaining best interest factor, a parent's conviction of a felony, simply has no application here. *See* § 211.447.6(1)–(7), RSMo 2000. Merely because some of the evidence supporting these best interest factors also supports the grounds for termination does not require reversal. *See In re V.M.O.*, 987 S.W.2d 388, 392 (Mo. App. W.D. 1999)

The trial court found under § 211.447.6(1) that the children have some emotional ties to their mother, but they are not positive. (L.F. 142.) Both the past and the current treating therapists testified to the children's emotional ties. (L.F. 142.) P.O. would physically withdraw when her biological family was discussed, and S.O. would become physically agitated. (Tr. 142.) Both referred to their parents by their first names. (Tr. 142.) Both felt guilty over their happiness out of the parental home. (Tr. 142.)

The trial court found under § 211.447.6(2) that the mother has not maintained regular visitation or other contact with the children. (Tr. 142.) The evidence supporting this has been discussed above.

The trial court found under § 211.447.6(3) that the mother failed to pay any of the costs of care and maintenance though financially able to do so, including the costs

of the time the children were in custody. (Tr. 142.) The supporting evidence has been discussed above.

The trial court found under § 211.447.6(4) that additional services would be unlikely to bring about lasting parental adjustment enabling the children to be returned home within an ascertainable period of time. (Tr. 142.) The evidence supporting this has been discussed in connection with the mother's failure to rectify the conditions that led to the children's removal.

The trial court found under § 211.447.6(5) that the mother's "actions and lack of actions" demonstrates her disinterest and lack of commitment to the children. (Tr. 143.) Likewise, this supporting evidence is discussed above.

The trial court found under § 211.447.6(7) that the mother committed deliberate acts that have subjected the children to a substantial risk of physical or mental harm; namely, she engaged in a long history of general neglect, she neglected medical treatment leading to the loss of sight in one of P.O.'s eyes and to lack of immunizations, she failed to educate the children, she allowed them to be infected with lice, and she caused them to live in filthy living conditions. (Tr. 143.) All discussed at length above.

Recalling the evidence in this case, this court simply cannot say that the trial court abused its discretion when it terminated the mother's parental rights because termination is "clearly against the logic of the circumstances," "so arbitrary and

unreasonable as to shock the sense of justice," and "lacks careful consideration." *In re A.S.*, 38 S.W.3d 478, 486 (Mo. App. W.D. 2001) (affirming that termination is in child's best interests).

For these reasons, termination of the mother's parental rights is in the children's best interests.

V.

The Division of Family Services is not required to reimburse Newton County for the cost of preparing the record on appeal when the mother has no standing to raise this issue in light of the circuit court's order allowing the mother to appeal as a poor person "without being required to prepay fees, costs, nor to give security therefore" and when that order did not place the responsibility for costs upon Family Services. (Responds to this court's order of May 28, 2003.)

No one is conditioning the mother's appeal on her prepayment of the cost of the record. In fact, two courts have ordered that the record on appeal, and all necessary copies of it, be prepared *without* prepayment of costs. That has been done, the record on appeal has been filed with this court, and copies of the record have been served on all the parties.

A. Cost of preparing record on appeal

When the mother moved to appeal as a poor person, the circuit court ordered that she may appeal "without being required to prepay fees, costs, nor to give security therefore." (L.F. 187.) And when she moved this court for an order requiring the Division of Family Services to advance her counsel the anticipated costs of copying

and mailing the legal file to this court and four parties (Motion for Costs Apr. 10, 2003, at 1, 2), this court ordered the Circuit Clerk of Newton County and Office of State Courts Administrator "to prepare legal file and transcript, respectively, and *necessary copies without prepayment of costs*." (Order May 28, 2003, emphasis added.)

This court's order made effective the circuit court's order. Newton County has paid those costs, totaling $2,601.32. (Appellant's Br. at 109–110; Appellant's App. 121–123.) One would think that the mother would be satisfied.

But she argues that the Division of Family Services should reimburse Newton County for the cost of preparing the record on appeal. Not being a Newton County official, the mother does not have standing to raise whether the county or the state agency bears that cost. "If a party's interests are unaffected by resolution of an issue he has no standing to raise it." *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227 (Mo. banc 1982). Whether the county or the state agency bears the cost of preparing the record does not affect the mother's interests.

If the mother were to have standing, Newton County must bear the cost of the record because the juvenile court did not order Family Services to pay any cost. Responsibility for the costs of a termination of parental rights proceeding rests upon the county except where the juvenile court places it upon Family Services. "Court costs shall be paid by the county in which the proceeding is instituted, except that the

court *may* require the agency or person having or receiving legal or actual custody to pay the costs." § 211.462.4, RSMo 2000 (emphasis added). With one exception not applicable here, a circuit court's "decision as to where the burden of costs falls is final and not subject to review." *In re M.V.*, 775 S.W.2d 262, 264 n. 2 (Mo. App. W.D. 1989). And apart from a circuit court order under § 211.462.4 requiring Family Services to pay costs, 13 CSR 40–30.020 does not provide authority for placing costs upon Family Services. "Upon motion by any party, *the court* in which the case is pending shall have the authority to determine based on a finding of indigency, whether the Division of Family Services should pay for counsel for a particular parent." 13 CSR 40–30.020(1) (emphasis added).

The mother cites *In re G.S.*, 137 N.J. 168, 644 A.2d 1088 (1994) as authority for requiring Family Services to reimburse Newton County for the cost of the record. But that case is not persuasive. New Jersey does not have a statute, as Missouri does, that places the cost of a termination proceeding upon the county unless a circuit court orders otherwise.

B. Cost of copying and mailing brief

This court overruled the mother's motion for an order requiring Family Services to advance her counsel the anticipated cost of copying her brief. (Order Aug. 23, 2003.) Therefore, her request that this court order Family Services to reimburse her

counsel and other attorneys for the cost of copying her brief, and to award them attorney fees for doing so, should be denied. (Appellant's Br. at 123.)

Counsel's copying and mailing costs for the mother's brief can be recovered, within the circuit court's discretion, when she applies for attorney fees. Section 211.462.4 permits the recovery of attorney fees for parents' court–appointed counsel as part of "court costs". *See* § 211.462.4*; In re A.D.G.*, 23 S.W.3d 717, 720–21 (Mo. App. W.D. 2000). Circuit courts may determine the fees for an appeal. "The circuit court has the expertise and discretion to order fees and to set the amount awarded, even when the award is for services on appeal." *In re A.D.G.*, 23 S.W.3d at 721 (remanding to determine attorney fees on appeal). And the cost of printing appellate briefs may be recovered under § 211.462.4 as well. *See In re R.S.P.*, 619 S.W.2d 863, 866 (Mo. App. W.D. 1981) (cost of printing guardian ad litem's brief). In light of the circuit court's and this court's orders, the mother's counsel need not have paid the cost of copying the legal file or the transcript.[9] Presumably, she has paid the cost of mailing the record.

[9]The mother suggests that her counsel has paid for the *entire* record on appeal. (Appellant's Br. at 117, 119.) If she did, she volunteered.

For these reasons, Family Services should not have to reimburse Newton County for the cost of preparing the record on appeal.

CONCLUSION

For the reasons stated above, the judgment terminating the mother's parental rights should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

GARY L. GARDNER
Assistant Attorney General
Missouri Bar No. 24779

Post Office Box 899
Jefferson City, Missouri 65102
Telephone (573) 751-3321
Facsimile (573) 751-9456

ATTORNEYS FOR RESPONDENT
DIVISION OF FAMILY SERVICES

CERTIFICATE OF SERVICE

I hereby certify that 1 copy and 1 computer diskette of the foregoing were served by first–class mail, postage prepaid, this day of ____ day of October, 2003, upon:

Sherri L. Hansen
P.O. Box 1379
Anderson, Missouri 64831

Belinda K. Elliston
114 W. 10th Street
Lamar, Missouri 64759

Terry A. Neff
P.O. Box 50
Neosho, Missouri 64850

Jerry Holcomb
P.O. Box 1846
Joplin, Missouri 64802

R. Scott Watson
Newton County Courthouse
Neosho, Missouri 64850

_____
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains _____ words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus–free.

_____
Assistant Attorney General